UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JENNIFER BRADLEY,

Plaintiff,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Defendants.

Civil Action No. 1:16-CV-00346 (RBW)

Judge: Reggie B. Walton

DEFENDANT NCAA'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT REGARDING NEGLIGENCE AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT PERTAINING TO DEFENDANT NCAA'S AFFIRMATIVE DEFENSES

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GLOSSARY

Term	Explanation	Docket No.
Manual	NCAA Manual, which is comprised of its Constitution, its Operating Bylaws, and its Administrative Bylaws	Various exhibits
MSJ	NCAA's Motion for Summary Judgment	87
Opp.	Plaintiff's Memorandum of Law and Points of Authorities in Opposition to Defendant NCAA's Motion for Summary Judgment and in Support of Her Motion for Summary Judgment Pertaining to Defendant NCAA's Affirmative Defenses	115-3
PSUMF	Plaintiff's Statement of Undisputed Material Facts	115-2
SAUMF	NCAA's Statement of Additional Undisputed Material Facts	Accompanies this filing
SUMF	NCAA's Statement of Undisputed Material Facts	87

DEFENDANT NCAA'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT REGARDING NEGLIGENCE

Ever since this Court dismissed most of Plaintiff's claims against the NCAA, she has struggled to identify a viable negligence theory. That was the case in Plaintiff's original response to the NCAA's motion for summary judgment and it remains the case with her most recent filing. The problem, it seems, is what Plaintiff believed was her most compelling claim against the NCAA (medical malpractice) is one that no longer exists. And so she alternatively attempts to repackage it or cobble together other arguments sounding in negligence. Her efforts are unavailing. It is now clear, based on the undisputed facts, that Plaintiff cannot make out any, much less all three, elements of her remaining cause of action:

Duty. The undisputed record demonstrates that Plaintiff has failed to establish that the NCAA owes a legally recognizable duty to Plaintiff. Nothing among the litany of passages Plaintiff cites from the NCAA Constitution demonstrates otherwise. This should come as no surprise given the administrative challenges that would exist in tending to the individual circumstances of over 450,000 collegiate athletes. As such, in identical or near-identical circumstances, courts across the country have refused to find the type of legal duty Plaintiff requests here. Ms. Bradley's effort to distinguish these cases is unavailing. And her failure to cite any authority in support of her own position is telling. The undisputed evidence and the law show that the NCAA owes no legally recognizable duty to Plaintiff.

Breach. Even if the NCAA's duties extended beyond member institutions, summary judgment would still be appropriate because the NCAA did not breach any legally recognizable duty. Plaintiff claims the NCAA failed to regulate and legislate on the issue of concussions. Plaintiff is wrong. The NCAA has done exactly that. In 2010, it adopted a requirement that all member institutions have a concussion management plan and it set forth the requirements for

compliance. Plaintiff also claims the NCAA was required to review evidence regarding institutional compliance with its regulations. But simply because Plaintiff prefers to interpret the NCAA Constitution in this manner does not make it so, nor does it impose a legally recognizable duty on the NCAA (much less provide a basis for breach). In any event, the NCAA *does* engage in periodic review and the record here establishes American University *did* have a concussion management plan, as required by the NCAA Constitution.

Causation. As to causation, by Plaintiff's own account, this is a "quintessential failure to diagnose case." Any failure was, however, at the hands of the various physicians who treated Plaintiff, none of whom was employed by the NCAA or otherwise affiliated with the Association. In fact, pursuant to NCAA guidelines, those doctors had the unchallengeable authority to determine Plaintiff's management and return-to-play. Because the injury, as alleged by Plaintiff, was caused by "the manner in which she was treated" and the NCAA played no role in her treatment, there is no causation.

ARGUMENT

Plaintiff's response to the NCAA's motion reveals why this issue is suitable for adjudication at summary judgment. Ms. Bradley does not dispute that whether the NCAA owed her a legally recognizable duty is a question of law. And she does not contest *at all* the NCAA's arguments on causation. Nor does she identify any factual issues requiring resolution. Indeed, it is clear from Plaintiff's brief that the parties agree when the initial in-game injury occurred, how it occurred, what doctors Plaintiff saw and when, what these doctors' diagnoses were, and what those diagnoses should have been. Accordingly, Plaintiff's negligence claim can be resolved at summary judgment and it should be resolved in favor of the NCAA.

I. THE NCAA DOES NOT OWE PLAINTIFF A LEGALLY RECOGNIZABLE DUTY OF CARE

A person is liable to another only when he owes some duty of care. *Bradley v. Nat'l Collegiate Athletic Ass'n*, 249 F. Supp. 3d 149, 175 (D.D.C. 2017). While courts typically look to foreseeability to answer that question as well as public policy and fairness considerations, *id.*, "it is first necessary to ascertain the scope of the defendant's undertaking, *for the scope of the defendant's undertaking determines the scope of its duty*." *Haynesworth v. D.H. Stevens Co.*, 645 A.2d 1095, 1098 (D.C. 1994) (emphasis added) (citation omitted). As the D.C. Court of Appeals has explained, "[t]his limitation on the foreseeability of risk imposed upon an actor's scope of duty has indeed been recognized by textwriters as the *predominant analytical approach*." *Id.* (emphasis added) (citations omitted).

A. *The Scope of the NCAA's Undertaking Does Not Extend to Plaintiff*

Rather than precisely identify "the scope of the [NCAA's supposed] undertaking [to] determine[] the scope of its duty," *Haynesworth*, 645 A.2d at 1098, Plaintiff does the opposite. Over the course of several pages, she rattles off, in scattershot fashion, various passages from the NCAA Constitution, ostensibly believing that something in there must amount to a legally recognizable duty. Opp. 3-5.[1] This is precisely the type of approach courts have rejected. "Such generalized, sweeping assertions are not sufficient as a matter of law to show that the NCAA undertook any *specific, affirmative tasks* that would amount to a voluntary undertaking." *McCants v. Nat'l Collegiate Athletic Ass'n*, 201 F. Supp. 3d 732, 740 (M.D.N.C. 2016) (emphasis added) (citing *Mayall v. USA Water Polo, Inc.*, 174 F. Supp. 3d 1220, 1228-29 (C.D. Cal. 2016) (rejecting the plaintiff's purported voluntary undertaking theory based on "sweeping allegations" as

[1] Plaintiff's opposition to the NCAA's motion for summary judgment (Dkt. 115) is referred to as "Opp." and the NCAA's motion for summary judgment (Dkt. 87) is referred to as "MSJ."

insufficient to show that the defendant undertook any specific task)). More importantly, Plaintiff's laundry list evinces the overarching problem with her cause of action: it has always been a theory in search of a duty. ***In fact, Plaintiff herself has testified that she did not assume the NCAA owed her a legally recognizable duty of care when things went wrong, but that this duty, instead, was that of her "trainer, [] coaches, and if it got any worse, the doctors."*** NCAA's Statement of Undisputed Material Facts ("SUMF"), Dkt. 87 (pp. 29-37) at ¶ 48.

To the extent anything can be discerned from Plaintiff's brief, it appears she argues the NCAA had (1) a duty to educate, monitor, regulate, and police member institutions, (2) a duty to legislate upon any subject of general concern (namely, concussions), and (3) an obligation to review evidence concerning athlete well-being supplied by member institutions. Opp. 5-7. Tellingly though, none of these theories describes a relationship between *Plaintiff* and the NCAA but rather the NCAA and the *member institutions* (i.e., the universities and colleges).

Like many associations, the NCAA's members determine its rules and the scope of its duties. SUMF ¶ 4. As the NCAA's governing documents (the "Manual"[2]) explain, there are many areas in which the NCAA member institutions have asked the NCAA to take direct involvement in enforcement and an active role in regulation. For example, the NCAA's Enforcement Program is charged with "eliminat[ing] violations of NCAA rules" and "imposing penalties [in order] to provide fairness to uninvolved student-athletes, coaches, administrators, competitors and other institutions." Ex. B[3] Manual § 19.01.1. The NCAA member institutions have recognized that these "enforcement policies and procedures are an essential part of the intercollegiate athletics program of each member institution." *Id*. at § 19.01.3. In the area of health and safety, however, and

[2] The NCAA Manual is comprised of its Constitution, its Operating Bylaws, and its Administrative Bylaws.
[3] Unless otherwise noted, all exhibit references set forth in the reply in support of the NCAA's motion for summary judgment are to those that accompany this filing, which are listed in the Index of Exhibits for NCAA's Reply in Support of its Motion for Summary Judgment Regarding Negligence.

specifically with respect to concussion management, the NCAA member institutions have determined through legislation to *retain* the duty to enact a concussion management plan and to be responsible for the implementation of that plan. *See* SUMF ¶¶ 6-9. The NCAA "only provides guidance for the consideration of its member institutions" and, even then, "does not establish a standard of care, instead deferring to the member institutions the responsibility of developing sports medicine policies for [t]he care and treatment of their student-athletes." *Bradley*, 249 F. Supp. 3d at 174. And for good reason. Issues of health and safety are best handled at the individual school level, by athletic trainers and doctors, who are "on the field" with student-athletes every day. This makes perfect sense because the NCAA is not in a position, from a governance or a practical perspective, to provide this type of care to 450,000 student-athletes.[4] *See also United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344 (1922) (rejecting argument that national union for 400,000 members should be held liable for actions of local union chapter because it "had authority to discipline [local] unions").[5]

To be sure, the NCAA does create rules, policies, and procedures designed for many purposes, one of which is to minimize the risk of injuries, but "such voluntary efforts at minimizing risk do not demonstrate [a] defendant bore a legal duty to do so." *Mayall*, 174 F. Supp. 3d at 1230 (citation omitted); *Mehr v. Féderation Internationale de Football Ass'n*, 115 F. Supp. 3d 1035, 1063-64 (N.D. Cal. 2015) (finding that federation's adoption of concussion management protocol did not constitute a specific duty to eliminate risks of soccer concussions). This is precisely the

[4] There is no contention here that through direct contact or otherwise with the NCAA, Plaintiff developed some sort of special relationship with the NCAA. In fact, neither Plaintiff nor her physicians contacted the NCAA about her symptoms or injuries. SUMF ¶ 42, Ex. A, Excerpted Deposition of Jennifer Bradley ("Bradley Depo."), 271:22-272:8, 288:7-22.

[5] Plaintiff attempts to distinguish *United Mine Workers of Am.*, by noting the Supreme Court rejected the union's argument that it was categorically exempt from suit. Opp. 14. But that is not the NCAA's contention here. Like the national union's alternative argument (which the Supreme Court *did embrace*), the NCAA asserts it did not assume a duty based on the obligations set forth in the body's governing documents.

conclusion arrived at by the court in *McCants*, 201 F. Supp. 3d at 740. There, the focus was also on safeguarding student-athletes (educational opportunities rather than physical safety). The plaintiffs similarly targeted NCAA Bylaw § 22.2.3.3, which states that member schools shall "provide evidence that the well-being of student-athletes and the fairness of the treatment is monitored, evaluated, and addressed on a continuing basis." *Id.* at 744; *cf.* Opp. 7 (identifying duty as obligation to "provide evidence that the well-being of student-athletes and the fairness of their treatment is monitored, evaluated, and addressed on a continuing basis"). And like Plaintiff's focus here on the alleged duty to ensure member institutions are generally adhering to physical safety requirements, in *McCants*, the plaintiffs focused on the NCAA's obligation "to safeguard[] the educational opportunities of student-athletes . . . by policing 'Sound Academic Standards.'" 201 F. Supp. 3d at 744. The court rejected plaintiff's theory, concluding, "the adoption of rules, policies, and procedures … is insufficient as a matter of law to impose a legal duty based on the voluntary undertaking doctrine." *Id.* at 745. "[R]egulating an activity," the court reasoned, "is not the same as engaging in it, or even controlling it." *Id.* (citations omitted). And nowhere did "Plaintiffs allege[] that the NCAA actually engaged in the[] specific tasks" of "supervis[ing]" and "monitor[ing]." *Id.* (original emphasis omitted).

The same reasoning was embraced by the court in *Lanni v. Nat'l Collegiate Athletic Ass'n*, 42 N.E.3d 542, 553 (Ind. Ct. App. 2015). There, the court explained, "the specific duties undertaken by the NCAA with respect to the safety of its student-athletes [i]s simply to provide information and guidance to the NCAA's member institutions and student-athletes." *Id.* While the court commended the NCAA for "actively engag[ing] its member institutions and student-athletes in how to avoid unsafe practices," it was careful to explain "those acts do not rise to the level of assuring protection of the student-athletes from injuries that may occur at sporting events."

Id. Although Plaintiff attempts to distinguish *Lanni* by noting the case involved injuries *during* a sporting event, *see* Opp. 11, the theory of liability was the same as the one Plaintiff advances here: "[a]ctual oversight and control" should be "imputed [] from the fact that the NCAA has promulgated rules and regulations."[6] *Lanni*, 42 N.E.3d at 553. A plain reading of the NCAA Manual forecloses that contention. *Supra* at pp. 3-5.

It is only by disregarding the text and falsely presuming such an obligation that Plaintiff can attempt to distinguish the NCAA's other cases. For instance, Plaintiff claims *Yost v. Wabash Coll.*, 3 N.E.3d 509 (Ind. 2014), is distinguishable because "[u]nlike the NCAA, the national fraternity's bylaws did not set up compliance committees or promote itself as an overseer of the local chapters." Opp. 12. But there, as here, "[t]he national fraternity lacked any direct oversight and control of the individual fraternity members." *Yost*, 3 N.E.3d at 521. As this Court previously explained, it is "the responsibility of each *member institution* [not the NCAA] to protect the health of, and provide a safe environment for, each of its participating athletes.'" *Bradley*, 249 F. Supp. 3d at 174 (emphasis added); *see also* SUMF ¶ 7; Ex. B, Manual §§ 2.01, 2.1.1 (explaining that while "[l]egislation enacted by the Association governing the conduct of intercollegiate athletics shall be designed to advance" certain principles, including student-athlete well-being, "[i]t is the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of the Association"); *id.* at § 2.2.3 ("It is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes."). That's also why *Wells v. Nat'l Collegiate Athletic*

[6] Plaintiff's attempt to distinguish *Craig v. Amateur Softball Ass'n of Am.*, 951 A.2d 372, 377 (Pa. Super 2008), is similarly unavailing. Opp. 12. Plaintiff asserts that *Craig* is irrelevant because it concerns mid-sport injury, *id.*, but it is the argument advanced by the plaintiff in *Craig* that matters. There, the plaintiff asserted that, as an organizer of a sporting event, the defendant was obligated to exercise reasonable care. *Craig*, 2008 PA Super 123 at ¶ 12, 951 A.2d at 377. Just as the NCAA does not engage in active oversight or control, the court found the defendant in *Craig* promulgated rules but did not actually organize or operate the softball game at issue. *Id.*

Ass'n, No. CV-2013-902657, 2017 WL 958272 (Ala. Cir. Ct. Mar. 7, 2017), is on point. Though Plaintiff notes that the proclaimed duty at issue there differed from that here, the court's opinion did not turn on particular duties. It turned on the general relationship between the NCAA, the member institutions, and student-athletes. So analyzed, the court ruled, the student-athlete's "relationship was with her college, not the national association." *Wells*, 2017 WL 958272, at *10.

Confronted by these authoritative headwinds, Plaintiff does not even attempt to address the NCAA's other cited authority: *Edwards v. Doug Ruedlinger, Inc.*, 669 So. 2d 541 (La. Ct. App. 1996), and *Serrell v. Connetquot Cent. High Sch. Dist. of Islip*, 280 A.D.2d 663 (N.Y. App. Div. 2001). MSJ 15. Yet, both are relevant and both merit a response. In *Edwards*, the court found the Louisiana High School Athletic Association ("LHSAA")—a rulemaking body "responsible for managing, coordinating, supervising, promulgating, and setting rules and regulations"—did not owe a duty to individual student-athletes. 669 So. 2d at 544. Rejecting the plaintiff's contention that the LHSAA was obligated to ensure enforcement of its rules, the court explained that "[a]s a voluntary association of schools, [the LHSAA's] power and authority in the face of a violation of its rules or bylaws is limited to suspension or expulsion from competition of an offending member." *Id.* at 545. "To impose a duty on the LHSAA to control the conduct of those who allegedly failed to act to prevent [the plaintiff's] injury would be to alter its fundamental structure." *Id.* Similarly, in *Serrell*, the court declined to find a high school athletic organization owed a duty to student-athletes to dictate and implement return-to-play protocols. 280 A.D.2d at 663-64; *see also Karas v. Strevall*, 884 N.E.2d 122 (Ill. 2008) (holding that hockey association had no duty to injured player based on Illinois' contact sports exception). These cases confirm the absence of any legally recognizable duty between an athletic association and student-athletes. Plaintiff's failure to address them is telling.

Even more telling though is the fact that Plaintiff offers no legal authority of her own. On a pure question of law, this omission counsels in favor of finding—in conformity with the NCAA's Manual, the prevailing caselaw, and the Court's prior recognition—that the NCAA has no legally recognizable duty to individual student-athletes.

B. *Public Policy and Fairness Considerations Confirm the Absence of a Legally Recognizable Duty*

Public policy considerations only militate further in favor of finding the NCAA has no legally recognizable duty to Plaintiff. *See Bradley*, 249 F. Supp. 3d at 177 ("considerations of fairness and public policy play a role in a court's analysis of foreseeability in determining duty"). As noted, the NCAA is structured in such a way that it only wields the authority delegated to it by its members and its members did not delegate to the NCAA individualized control over student-athlete well-being. *See* SUMF ¶¶ 4-7. That the NCAA's relationship is with member institutions rather individual student-athletes is rooted, in part, in pragmatic concerns. After all, it would be difficult, if near impossible, for the NCAA to police every game, every practice, and every discussion with medical staff. To impose upon it such a duty would necessitate a fundamental overhaul of the Association. And even then, the NCAA necessarily lacks the depth of relationship that a student-athlete develops with her coaches, trainers, and treating physicians. The NCAA, a non-medical provider and unincorporated association based in Indianapolis, cannot (and should not) usurp the role of the medical providers who treat student-athletes on a daily basis according to their own legal, medical, and ethical obligations.

In the end, such a determination could force the NCAA to distance itself from evaluating and adopting regulations for the protection of student-athletes—an outcome that undercuts the very goal Plaintiff professes to champion. In circumstances such as this—where the proposed duty would be "realistically incapable of performance or fundamentally at odds with the nature of the

parties' relationship"—courts have been "loath to recognize" it. *Orr v. Brigham Young Univ.*, 960 F. Supp. 1522, 1527 (D. Utah 1994) (citation omitted); *see also Bradley*, 249 F. Supp. 3d at 177 ("public policy considerations provide support for shielding athletic conferences from litigation involving an injury to an athlete based on an athlete's participation in a sporting event sanctioned by the athletic conference, without a showing that the athletic conference took affirmative steps to establish a requisite duty of care").

Plaintiff responds by asserting there is no financial concern because the NCAA is already subject to concussion-related lawsuits and, in fact, Plaintiff claims, a verdict would improve the plight of student-athlete safety by "avoid[ing] similar outcomes in future cases." Opp. 17. To the extent this argument is rooted in a desire to impose upon the NCAA a direct, legally recognizable duty to individual student-athletes, that goes beyond the NCAA's capabilities as a regulatory body.[7] It would be akin to requiring a state bar association to do more than, say, monitor attorney CLE compliance and, instead, actively oversee their daily compliance with rules of ethics and professionalism within every pleading and hearing. That is counter to the current reality of how the Association operates and would be impracticable.

II. THE NCAA DID NOT BREACH ANY PERCEIVED DUTY

As explained above, the NCAA's relationship is with its member institutions. Those institutions are responsible for, and in control of, their respective intercollegiate athletic programs including the health and safety of their participating student-athletes. *See* SUMF ¶¶ 4-7. Nonetheless, Plaintiff contends the terms of the NCAA's governing documents extend directly to individual student-athletes. Specifically, Plaintiff claims the Association breached duties owed to Plaintiff by failing to "legislate . . . upon any subject of general concern," Opp. 5-6, "promote

[7] If, however, this argument is predicated upon Plaintiff's misconception of the NCAA's policy, *see infra* at pp. 10-13, it would not incentivize anything because the NCAA already has the policy she professes it should.

education to enhance the health and safety of student-athletes," *id.* at 7, and ensure member institutions "provide evidence that the institution has in place programs that protect the health of and provide a safe and inclusive environment for each of its student athletes," *id*. at 7-10. Even if these terms could be construed as creating a legally recognizable duty to individual student-athletes (which they cannot), they have not been breached because the NCAA did, in fact, legislate a requirement that its member institutions adopt and implement a concussion management plan and it is undisputed that American University did so. Thus, if the NCAA had any such duty, that duty was fully dispatched.

On August 12, 2010, the NCAA Division I Board of Directors—comprised entirely of conference and university representatives—adopted legislative updates that were included in the NCAA Division I Manual to require that all active member institutions "have a concussion management plan for [their] student-athletes." SUMF ¶ 8. Among other things, the plan required member institutions to create a process that ensures that "a student-athlete who exhibits signs, symptoms or behaviors consistent with a concussion shall be removed from athletics activities . . . and evaluated by a medical staff member . . . with experience in the evaluation and management of concussions," and a policy that "precludes a student-athlete diagnosed with a concussion from returning to athletics activity . . . ."[8] SUMF ¶ 9. While Plaintiff seems to suggest there should be something more,[9] that contention is based on nothing other than her own personal preferences.

[8] Furthermore, as the Runkle Memo, which was sent out to athletic trainers across the country, states, "[h]ealthcare professionals should assume a concussion when unsure" and "[w]hen in doubt, sit the athlete out." Ex. D, Apr. 29, 2010 Letter from Debra Runkle to NCAA Head Athletic Trainers ("Runkle Memo"), at 2. It is only when the player is "asymptomatic and post-exertion assessments are within normal baseline limits" that an athlete "may return to play[,] …follow[ing] a medically supervised stepwise process." *Id*. at 4. Plaintiffs' own expert characterized the NCAA's protocol as "very appropriate" and "pretty close" to state of the art. SUMF ¶ 44; Ex. E, Excerpted Deposition of Dr. Robert Cantu ("Cantu Depo.") 129:1-15. And Plaintiff herself explains that the NCAA embraced her preferred policy: "[W]hen questioned on the NCAA's policy on how a student-athlete should be treated when experiencing symptoms of a concussion without a diagnosis, Ms. Wilfert testified that the policy was to sit them out." Opp. 6.

[9] Plaintiff continually brushes aside the NCAA's adoption of policies as if they are some trivial undertaking and inadequate to fulfill its obligations. *See, e.g.*, Opp. 7 (taking issue with Ms. Wilfert's supposed inability to identify

Those are not enough to survive summary judgment. *See, e.g.*, *Chambers v. D.C.*, 389 F. Supp. 3d 77, 84 (D.D.C. 2019) ("plaintiff fails to respond to any of the arguments advanced by the District in its motion for summary judgment, but rather relies on factually unsupported conclusory assertions as support for her legal arguments, which are insufficient to survive summary judgment"); *Bonieskie v. Mukasey*, 540 F. Supp. 2d 190, 195 (D.D.C. 2008) ("Summary judgment for a defendant is most likely when a plaintiff's claim is supported solely by the plaintiff's own self-serving, conclusory statements.").

Plaintiff also refers to Section 22.2.3.3(a), which demands that member institutions provide evidence concerning the well-being of student athletes. Opp. 7. Though this requirement only pertains to member institutions, Plaintiff construes it as requiring dissemination of evidence from the member institutions to the NCAA. But that is not how it works. Addressing this precise provision, Mary Wilfert, the NCAA's corporate designee, explained, "it's not that the[] [institutions] are submitting something to the NCAA on a routine basis. It's housed internally. If there is any kind of a violation, that can be a self-report to the NCAA." Ex. C, Excerpted Deposition of Mary Wilfert ("Wilfert Depo.") 72:3-8; *see also id.* at 73:25-74:3 ("[M]ost of the evidence of that functioning is within the institution. With a violation, that's when it gets reported … to the national office."). Plaintiff presented no evidence that it has been construed otherwise. Again, her bare assertions otherwise are insufficient. *See, e.g.*, *Chambers*, 389 F. Supp. 3d at 84; *Bonieskie*, 540 F. Supp. at 195.

Moreover, while insisting that the NCAA undertake some review of member institution compliance, Plaintiff overlooks the fact that the Committee on Athletic Certification episodically assesses institutional compliance based on each school's self-study report, which is generated and

anything other than publication of the Sports Medicine Handbook and offer legislative proposals). These activities *do* fulfill the NCAA's obligations. Plaintiff's mere assertions otherwise are inadequate.

peer reviewed every ten years. Ex. B, Manual §§ 22.2, 22.3. Here, it is undisputed that American University had a concussion management plan in place, as mandated by the NCAA's guidelines. Ex. G, American University's Concussion Policy ("AU Concussion Policy"). And that plan tracked the NCAA's 2010 requirements, which Plaintiff's own expert agrees were appropriate, SUMF ¶ 44; Ex. E, Cantu Depo. at 129:1-15. And pursuant to that plan, American University had Plaintiff see a physician. The problem, as Plaintiff herself acknowledges, is the physician's "failure to diagnose." Opp. 27. Whether that constitutes a breach in medical practice may have to be resolved, but what is not up for dispute is whether that constituted a breach by the NCAA.

Because there is no evidence that the NCAA failed to comply with the only discernable policies identified by Plaintiff, it could not have breached and summary judgment is therefore appropriate.

III. THE NCAA'S ACTIONS WERE NOT THE PROXIMATE CAUSE OF PLAINTIFF'S ALLEGED INJURIES

In its motion for summary judgment, the NCAA explained why, even under Plaintiff's own theory, the issue of proximate causation can—and should—be resolved in its favor. This argument was set off by a freestanding heading (page 17) and the NCAA explained in detail—over the course of four pages accompanied by caselaw—why the only misconduct here, and thus the proximate cause, was the failure of Plaintiff's doctors to properly diagnose her injury. MSJ 16-19. Plaintiff offered no response to the NCAA's proximate cause argument.[10] Where, as here, "a party fails to address an argument that is put forth in a dispositive motion, that argument may be deemed conceded." *Arnold v. Jewell*, 6 F. Supp. 3d 101, 112 (D.D.C. 2013) (quoting *Antoine v. U.S. Bank*

[10] The only discussion of proximate cause in Plaintiff's filing is not contained in the opposition to the NCAA's summary judgment motion. Opp. 31-32. It is part of Plaintiff's affirmative motion for summary judgment on the NCAA's affirmative defenses. *Id.* In particular, it pertains to contributory negligence, which is a distinct proximate cause analysis than the one the NCAA focuses on here. The former pertains to plaintiff's negligence; the latter focuses (at least for purposes of this motion) on her physician's failings. Plaintiff says nothing about the latter.

Nat'l Ass'n, 821 F. Supp. 2d 1, 6 (D.D.C. 2010)). That is particularly appropriate in these circumstances given that Plaintiff has had the unique advantage of filing this brief twice. *See* Dkt. Nos. 90, 115.

But even if this Court were to disregard Plaintiff's failing (which it should not), summary judgment would still be warranted because the proximate cause for Plaintiff's negligence claim is the action (or, more properly stated, inaction) of her physicians, not the NCAA. Plaintiff herself has explained her theory as follows: "it is not the suffering of a concussion that she raises complaints about, *but the manner in which she was treated*." Opp. 12 (emphasis added). Indeed, she characterizes this case as "the quintessential *failure to diagnose* case," arguing that if her concussion had "been treated appropriately, [her] symptoms more likely than not would have resolved."[11] *Id.* at 27 (emphasis added).

The problem for Plaintiff, at least in regard to the NCAA, is this is simply a repackaging of her previously dismissed medical malpractice claim against the NCAA. *Bradley*, 249 F. Supp. 3d at 173-74. What was apparent at the pleading stage has only been confirmed since: the NCAA had no involvement in Plaintiff's treatment. First, there was Dr. Aaron Williams. He independently assessed Ms. Bradley and concluded unequivocally she did not meet the criteria for a concussion. SUMF ¶ 26. He diagnosed her instead with "sinusitis." Ex. F, Excerpted Deposition of Dr. Aaron Williams ("Williams Depo.") 138:21-139:15. Plaintiff claims that was wrong. Ms. Bradley then saw Dr. Michael Morris. He too independently evaluated her. He also concluded Ms. Bradley did not suffer a concussion, diagnosing her instead with a brain virus and vertigo. Ex. A, Bradley Depo. 77:11-80:2; 84:12-25; 96:5-11. Plaintiff also saw her family physician, Dr.

[11] Plaintiff affirmatively disclaims any theoretical liability by the NCAA prior to her reporting her symptoms and seeing physicians. Opp. 23 ("Plaintiff's case does *not* fault the Defendants for allowing her to participate in field hockey prior to suffering the concussion, nor does it fault the Defendants with failing to hold her out prior to the time that she voiced her complaints.") (emphasis in original).

Kumar, on two separate occasions and on both occasions, Dr. Kumar did not diagnose Plaintiff with a concussion. *Id*. at 90:9-16. Dr. Kumar recommended Plaintiff to Dr. Singh. *Id*. at 90:14-91:2. Finally, in the spring of 2012—***over six months after she suffered an in-game concussion and after she played in multiple other competitions and practices***—Plaintiff was diagnosed with a concussion. *Id*. at 100:21-101:15.

Plaintiff alleges she was misdiagnosed on at least three occasions by different treating physicians. But that purported failing was not the NCAA's. As this Court previously explained, the NCAA has no "right to control or direct the healthcare providers who treated the plaintiff at [her] University," is not "an entity licensed or otherwise authorized under District law to provide healthcare services," and did not provide any healthcare services to Ms. Bradley. *Bradley*, 249 F. Supp. 3d at 173-74 (citation omitted). Indeed, none of Plaintiff's doctors were employed by the NCAA, nor did any of them consult with the NCAA. Plaintiff does not dispute any of this. And, during her November 2017 deposition, Ms. Bradley admitted she never called anyone at the NCAA and did not talk to anyone known to be affiliated with the NCAA about her alleged injury or any of her symptoms. Ex. A, Bradley Depo. 271:22-272:8, 288:7-22. Nor did Plaintiff or her physicians contact the NCAA about her symptoms, injuries, or otherwise. *Id*. She also does not dispute that, pursuant to NCAA guidelines, these doctors "had [the] unchallengeable authority to determine management and return-to-play." Ex. D, Runkle Memo at 1, 3. As such, the NCAA played no role in this "quintessential failure to diagnose case."

Though Plaintiff offers no discussion of proximate cause, to the extent her brief could be construed as suggesting that, with proper oversight, American University would have properly placed her in the concussion management plan just after she suffered her in-game injury and avoided further damage, that contention misses the mark for several reasons. First, Plaintiff's

characterization of the oversight required ignores that the arrangement between the NCAA and member institutions is governed by the "principal of institutional control and responsibility," which imposes on each institution the obligation to ensure compliance with the NCAA's rules and regulations. Ex. B, Manual § 2.1; *see also supra* at pp. 12-13 (explaining the extent of NCAA's review of institutional self-studies). Plaintiff is not free to manufacture her own oversight standard, retroactively impose it upon the NCAA, and then argue liability flows therefrom.

Second, Plaintiff's argument presumes there was something for the NCAA to correct. However, American University's concussion protocol mirrored the requirements set forth by the NCAA, *compare* SUMF ¶ 9 *with* Ex. G, AU Concussion Policy—requirements that Plaintiff's own expert testified were "appropriate" and near "state of the art." SUMF ¶ 44; Ex. E, Cantu Depo 129:1-15.

Third, even if American University had utilized Plaintiff's preferred "suspicion" standard in easing Ms. Bradley back into competition, it would not have led to a different result because the undisputed facts show that none of Plaintiff's first three physicians "suspected" a concussion. Each ruled it out and offered different diagnoses. Thus, even under Plaintiff's preferred standard, she would have suffered the same fate. And there is certainly no basis to elevate non-medical "suspicion" over the diagnosis of medical professionals. Accordingly, were the Court to excuse Plaintiff's failure to address proximate cause, it should still find the absence of any as regards the NCAA.

CONCLUSION

For the reasons described in detail above, and in the NCAA's motion for summary judgment, this Court should grant summary judgment in the NCAA's favor, and dismiss Plaintiff's negligence claim against the NCAA, *with prejudice.*

DEFENDANT NCAA'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT PERTAINING TO DEFENDANT NCAA'S AFFIRMATIVE DEFENSES

Because the NCAA's motion for summary judgment should be granted, there is no need to address Plaintiff's. As we explained above, the undisputed facts demonstrate that, on account of the cascading relationship between the NCAA, member institutions, and individual student-athletes, it does not have a legally recognizable duty to individual student-athletes; even if it did, there was no breach of any alleged duties because the NCAA fulfilled its obligations; and, further still, there is no causation because, under Plaintiff's own theory, this is a failure to diagnose case and the NCAA had no involvement in Plaintiff's diagnosis. But if the Court were to address Plaintiff's motion for summary judgment pertaining to the NCAA's affirmative defenses, it should be denied.

First, Plaintiff's motion is impermissibly rooted in a medical malpractice theory. While that argument may have traction against defendants with pending medical malpractice claims against them, it has none against the NCAA because this Court dismissed that claim years ago. Stripped of its foundation, Plaintiff's argument unravels.

Second, Plaintiff improperly limits the relevance inquiry to events that post-date her reporting to American University staff. If Plaintiff insists that is the only relevant time frame, the NCAA will not oppose, provided she dismisses the Association because it had no involvement in the process that led to her misdiagnoses. If, however, Ms. Bradley is unwilling to cede the point, she cannot preclude the NCAA from presenting alternative, or contributing, causation theories and explaining why those causes were a consequence of Ms. Bradley's own negligence and/or her assumption of risk.

Third, there is evidence—indeed, significant evidence—that supports the NCAA's affirmative defenses. Ms. Bradley assumed the risk of a concussion from playing. She signed

acknowledgment of risk papers, signed a separate concussion statement, and has conceded she was aware that field hockey can involve violence. Ms. Bradley was also contributorily negligent. Despite claiming to have symptoms for about ten days, she did not tell anyone. She thus prevented medical staff from evaluating her and, even worse, continued to play, thereby exposing herself to further damage. Relatedly, she failed to mitigate the risk by remaining silent. She could have—and, indeed, should have—spoken up but did not. Whether all of this is sufficient to preclude Ms. Bradley from securing her requested relief is one thing, but, at a minimum, the evidence is certainly sufficient to permit the NCAA to proceed with its affirmative defenses.

PROCEDURAL HISTORY

On February 23, 2016, Plaintiff filed an Amended Complaint against several defendants, including the NCAA. *See* Pl.'s Am. Complaint, Dkt No. 1-5 (hereinafter "Pl.'s Am. Complaint"). Plaintiff's Amended Complaint contained six claims against the NCAA, including negligence, gross negligence, negligent infliction of emotional distress, fraudulent misrepresentation, breach of contract, and medical malpractice. *See id.* at ¶¶ 137-56, 169-88, 195-205. On April 12, 2017, this Court dismissed all claims against the NCAA, except for Plaintiff's negligence claim. *See Bradley*, 249 F. Supp. 3d at 167-74.

Plaintiff, through her *one* remaining claim of negligence against the NCAA, alleges the NCAA owes numerous duties to individual student-athletes, including, "a duty to protect the physical and mental well-being of all student-athletes participating in intercollegiate sports." Pl.'s Am. Complaint ¶ 138; *see also id.* at ¶ 142 (setting forth other duties). On May 12, 2017, the NCAA filed its Answer, setting forth (as particularly relevant here) defenses of contributory negligence, assumption of the risk, and failure to mitigate damages. *See* NCAA's Answer and

Affirmative Defenses to Pl.'s Am. Complaint, Dkt. No. 42 at 13-14 (hereinafter "NCAA's Answer").

On January 16, 2019, Plaintiff filed a motion for summary judgment against all defendants pertaining to affirmative defenses. Dkt. 86. The NCAA opposed, explaining, *inter alia*, that the motion was fundamentally flawed because it failed to differentiate among the defendants. Dkt. 94 at 13-14. This Court agreed and, thus, denied Plaintiff's motion, ordered her to refile, and do so in a manner that would allow the Court to "resolve [her] motion[] without significant difficulty." Dkt. 112 at 5. On November 1, 2019, Plaintiff refiled her motion. Opp. at 19-32.[12] Her submission complies with the Court's instructions in form but not in substance. That's because, with only minor exceptions, Plaintiff has re-submitted the exact same brief. *Compare* Dkt. 86-2 *with* Opp. at 19-32. Indeed, though ostensibly moving only as to the NCAA, Plaintiff's motion still refers throughout to "Defendants." Opp. 19-32 (using the term over two dozen times, including in headings). It appears Plaintiff filed a near-duplicate motion as to the United States. Dkt. 114-3. It is yet to be seen whether she will be more surgical—and compliant with the Court's instructions—in any forthcoming cross-motion she submits against the University and Medical Defendants. *See* Dkt. 112 at 8.

FACTUAL BACKGROUND

The NCAA's Governance Structure

The NCAA is a member-led, voluntary association comprised of more than 1,100 member institutions. *See* NCAA's Statement of Additional Undisputed Material Facts ("SAUMF") ¶ 25.[13]

[12] Although these references are to Plaintiff's summary judgment motion (which appears at the latter half of her opposition to the NCAA's motion for summary judgment, Dkt. 115), for the sake of continuity, we continue to refer to Plaintiff's consolidated filing as "Opp."

[13] The NCAA's Statement of Additional Undisputed Material Facts is combined with and follows its Response to Plaintiff's Statement of Undisputed Material Facts. That consolidated filing accompanies this submission.

Like all member-led associations, it is the NCAA's members who determine the rules of the Association and the scope of the Association's duties and authority. *See* SAUMF ¶ 26. The NCAA does not control its members, or wield authority and responsibility over its members' activities, except with respect to those areas where the members have specifically delegated those roles to the NCAA. *See* SAUMF ¶ 27.

Determining Appropriate Care and Treatment

The NCAA's governing documents, including the 2010-2011 NCAA Sports Medicine Handbook (the "Handbook") and the 2011-2012 NCAA Division I Manual, demonstrate that the oversight and control of a student-athlete's well-being is not an area that has been delegated to the NCAA. *See* SAUMF ¶ 28. Rather, they provide that member institutions, *not* the NCAA, retain nearly all of the control and oversight of intercollegiate sports-related activities, and make it clear that each member institution, *not* the NCAA, is responsible for, and in control of, its intercollegiate athletics program, including the health and safety of its participating student-athletes. *See* SAUMF ¶ 29. According to the Handbook, the "determination of the appropriate care and treatment of student-athletes must be based on the clinical judgment of the institution's team physician or athletic health care team that is consistent with sound principles of sports medicine care." SAUMF ¶ 30.

Concussion Management

On August 12, 2010, the NCAA Division I Board of Directors, comprised entirely of conference and university representatives, adopted legislative updates that were included in the NCAA Division I Manual to require that all active member institutions "have a concussion management plan for its student-athletes." SAUMF ¶ 31. The plan was required to include, but not be limited to, the following:

> (a) An annual process that ensures student-athletes are educated about the signs and symptoms of concussions. Student-athletes must acknowledge that they have received information about the signs and symptoms of concussions and that they

> have a responsibility to report concussion-related injuries and illnesses to a medical staff member;
>
> (b) A process that ensures a student-athlete who exhibits signs, symptoms or behaviors consistent with a concussion shall be removed from athletics activities (e.g., competition, practice, conditioning sessions) and evaluated by a medical staff member (e.g., sports medicine staff, team physician) with experience in the evaluation and management of concussions;
>
> (c) A policy that precludes a student-athlete diagnosed with a concussion from returning to athletics activity (e.g., competition, practice, conditioning sessions) for at least the remainder of that calendar day; and
>
> (d) A policy that requires medical clearance for a student-athlete diagnosed with a concussion to return to athletics activity (e.g., competition, practice, conditioning sessions) as determined by a physician (e.g., team physician) or the physician's designee.

SAUMF ¶ 32.

Plaintiff's Education on the Signs and Symptoms of Concussions

Plaintiff played field hockey for American University ("AU") voluntarily and with full knowledge of the risks associated with playing the sport. *See* SAUMF ¶ 33. According to Plaintiff, "[f]ield hockey is a . . . physical sport." SAUMF ¶ 34. During an AU pre-season compliance meeting, Plaintiff "signed concussion papers," which set forth the risks associated with concussions, and Plaintiff admits that she was informed that "if you're experiencing certain [concussion] symptoms to tell your trainer." SAUMF ¶ 35.

Moreover, on July 1, 2009, Plaintiff signed an "Acknowledgement of Risk" agreement with AU, where she acknowledged that she is aware of "the risks of injury inherent in athletic activities;" the risks in playing field hockey, in particular; and "that such risks may include death, paralysis and other serious permanent bodily injury." SAUMF ¶ 36. Plaintiff acknowledged that "participation in intercollegiate athletics includes the risk of injury, including, but not limited to serious permanent injury and death" and that "such injuries may occur in the absence of negligence." SAUMF ¶ 37. Plaintiff also signed AU's "Concussion Statement," which reads: "I

understand that participation in intercollegiate athletics includes the risk of injury, including but not limited to serious permanent injury and death. I further understand that there is a possibility that participation in my sport may result in a head injury or concussion. I have been provided with education on head injuries and understand the importance of ***immediately*** reporting symptoms of a head injury/concussion to the Sports Medicine Staff." SAUMF ¶ 38 (emphasis added).

Plaintiff's Alleged Injury and Diagnosis

On September 23, 2011, Ms. Bradley allegedly suffered a concussion resulting from a collision during a field hockey game against the University of Richmond. *See* Plaintiff's Statement of Undisputed Material Facts ("PSUMF") ¶¶ 3-4. Despite allegedly experiencing symptoms, Plaintiff did not immediately report her injury to anyone on AU's sports medicine staff or any other medical professional. *See* PSUMF ¶¶ 3-5.

On September 25, 2011, Plaintiff played another game against Boston College, and still did not have any conversations with the AU trainers or coaching staff before or after the Boston College game regarding her alleged injury. *See* SAUMF ¶ 40. On October 1, 2011, Ms. Bradley and her team played Lehigh University ("Lehigh"). *See* SAUMF ¶ 41. According to Plaintiff, it was after the October 1st Lehigh game that she finally had a discussion with Sarah Thorn and Jenna Earls from AU's training staff. *See* PSUMF ¶ 5. Plaintiff also discussed her symptoms with Steve Jennings, the AU field hockey head coach. *See* PSUMF ¶ 5. By October 1, 2011, Plaintiff had been purportedly experiencing symptoms of her alleged concussion for about nine days. *See* PSUMF ¶¶ 3-5.

Plaintiff participated, and started in, an October 2, 2011, game against Temple University ("Temple"). *See* SAUMF ¶ 42. On October 3, 2011, Plaintiff sent an email to Ms. Earls, where Plaintiff noted, among other things, that when she is playing, she feels "dizzy and unfocused" and that it is "hard to concentrate on tactical things like the press." SAUMF ¶ 43. Ms. Bradley's

October 3, 2011, email was a clarification of the way Plaintiff described how she was feeling on October 1, and an explanation of the symptoms she was experiencing "for over a week" prior. SAUMF ¶ 44. As such, Plaintiff participated in AU's October 2, 2011 Temple game, despite feeling "dizzy and unfocused," among other things. SAUMF ¶ 45.

Ms. Earls, Plaintiff's field hockey trainer, scheduled an appointment for Plaintiff to see Dr. Aaron Williams on October 5, 2011. *See* PSUMF ¶¶ 14-15. Dr. Williams informed Plaintiff that she did *not* have a concussion. *See id*. According to Plaintiff, Dr. Williams, who—like all of Ms. Bradley's physicians—had unchallengeable authority under the NCAA protocol, did not say she could no longer play field hockey, but Dr. Williams may have asked her to sit out for the next two practices. *See* SAUMF ¶ 46, 52.

On October 16, 2011, Dr. Williams suggested that Plaintiff receive a second opinion. *See* SAUMF ¶ 47. Accordingly, on October 20, 2011, Plaintiff visited Dr. Michael Morris, an ENT specialist. *See* SAUMF ¶ 48. Dr. Morris diagnosed Plaintiff with a brain virus and vertigo. SAUMF ¶ 49. Neither Dr. Williams nor Dr. Morris were employed by or affiliated with the NCAA at the time of Plaintiff's alleged injury. *See* SAUMF ¶ 50.

After Dr. Morris's diagnosis, Plaintiff continued to participate in field hockey practices and games despite her symptoms, sitting out only intermittently. *See* SAUMF ¶ 51. From October 21, 2011, to November 4, 2011, Ms. Bradley played in games against Bucknell University, Georgetown University, and Lafayette University, in three of which she played as a starter. See PSUMF ¶¶ 18-19, 21-22.

From November 2011 through February 2012, Plaintiff met with various medical professionals until she was eventually diagnosed with a concussion sometime during the spring of 2012. *See* SAUMF ¶ 53. Although Plaintiff does not recall exactly when she was diagnosed with

a concussion, she is certain that she was diagnosed by neurologist, Dr. Puneet Singh. *See* SAUMF ¶ 53.

On June 6, 2018, Plaintiff's expert, Dr. Robert Cantu, testified that an athlete "should be held out from the time that [a] concussion is recognized," and "the sooner it's recognized, the better." SAUMF ¶ 54. Dr. Cantu stated that the NCAA's 2010 Handbook was "very appropriate," because it required that "anybody suspected of a concussion or diagnosed with a concussion needed to be immediately removed from a contest [i.e., practices or games]." SAUMF ¶ 55. According to Dr. Cantu, "the most criticism for this case" belonged not to the NCAA, but to Dr. Williams, who treated Ms. Bradley after her alleged injury, and found that she did not have a concussion. SAUMF ¶ 56.

Dr. Cantu also opined that "all of [Ms. Bradley's] subsequent practices and games that she played after [September 23, 2011] probably contributed to the very prolonged post-concussion syndrome that she ultimately sustained." SAUMF ¶ 57. Dr. Cantu specifically noted that the four days of activity between October 1, 2011, and October 5, 2011, "were part of the contribution." SAUMF ¶ 58. October 1-5, 2011 are the days spanning between the time Plaintiff told her AU training staff about her symptoms and when she visited with Dr. Williams regarding her head injury. Dr. Cantu explained his opinion as follows: "What I was trying to say was that it contributed, so that is part of the contribution. So, yes, I would say those four days were part of the contribution. I can't tell you a percentage, but definitely I would *not* say that those four days were immune from contributing." SAUMF ¶ 59. Significantly, Plaintiff does not—and cannot—allege that she spoke to anyone at the NCAA during this time period, relied on any information from the NCAA, or interacted with the NCAA in any way, shape or form.

According to Plaintiff, if her doctors informed her that she was not cleared to play, she would not have played. *See* SAUMF ¶ 61. And, she admits that her head coach would have followed the doctor's orders on her readiness to play. *See* SAUMF ¶ 62.

Plaintiff's Failure to Communicate with the NCAA Regarding Her Injuries

At no point did Ms. Bradley or her physicians communicate with the NCAA about Plaintiff's symptoms, injuries, medical history, or otherwise; and Plaintiff made no attempt to visit the NCAA's website in order to contact the NCAA or find the NCAA's contact information. *See* SAUMF ¶ 63. During Plaintiff's November 21, 2017, deposition, Ms. Bradley admitted that she never called anyone at the NCAA and did not talk to anyone known to be affiliated with the NCAA about her alleged injury or any of her symptoms. *See* SAUMF ¶ 64. Plaintiff concedes that she does not know what the NCAA could have done differently. *See* SAUMF ¶ 67.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56, Plaintiff is entitled to summary judgment, if Plaintiff can show that there is "no genuine dispute as to any material fact," and that she is entitled to "judgment as a matter of law." Fed. R. Civ. P. 56. However, the moving party is entitled to judgment as a matter of law *only* if the nonmoving party "fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). All reasonable inferences the Court draws from the evidence should be viewed in a light most favorable to the non-moving party. *See, e.g., Thompson v. Fathom Creative, Inc.*, 626 F. Supp. 2d 48, 54 (D.D.C. 2009).

On a motion for summary judgment, the Court must "eschew making credibility determinations or weighing the evidence." *Czekalski v. Peters*, 475 F.3d 360, 363 (D.C. Cir. 2007) (citations omitted). "[T]he evidence of the non-movant is to be believed, and all justifiable

inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citation omitted).

ARGUMENT

I. PLAINTIFF'S MEDICAL MALPRACTICE THEORY DOES NOT SUPPLY A BASIS FOR SUMMARY ADJUDICATION OF THE NCAA'S AFFIRMATIVE DEFENSES

Plaintiff's motion suffers from a foundational—and fatal—flaw: it *still* fails to distinguish among the defendants. Because Plaintiff conflated her arguments against them when she originally filed this motion, the Court asked that she go back and differentiate. Dkt. 112. With one minor exception,[14] the current motion is a verbatim repackaging of Plaintiff's initial filing. *Compare* Dkt. 86, *with* Opp. 19-32.

This is no trivial oversight. The entirety of Plaintiff's submission now, as it was then, is rooted in a medical malpractice claim misdirected at the NCAA. Plaintiff says so herself, explaining, this is "the quintessential failure to diagnose case," and what "is truly at issue," is that had Plaintiff's concussion "been treated appropriately, [her] symptoms more likely than not would have resolved." *Id.* at 27; *see also id.* at 21 (explaining that this case "is not about the fact that she suffered a concussion but rather is about the *negligent care and treatment* that was provided to her *after* sustaining the concussion") (emphasis added). If there were any confusion regarding the nature of the claim, Plaintiff makes it clear when she states, "a patient cannot assume the risk of *medical malpractice*," *id.* at 22 (emphasis added),[15] expressly relies on medical malpractice caselaw, *id.* at 30, and endeavors to distinguish cases involving exceptions to application of assumption of the risk in the medical malpractice context, *id.* at 25.

[14] The one exception is that Plaintiff originally set forth the answers, affirmative defenses, and experts for all defendants, but now lists only those for the NCAA. *Compare* Dkt. 86-2 at 2-5, *with* Opp. 19-21 (answers and affirmative defenses); *compare* Dkt. 86-2 at 12, *with* Dkt. 115 at 27 (experts). Otherwise, the substance of Plaintiff's motion against the NCAA is the same as it was as to all defendants.

[15] *See also id.* at 31 (characterizing operative time frame as that relating to "medical malpractice").

The problem for Plaintiff is that this Court "dismiss[ed] [P]laintiff's medical malpractice claim against the NCAA." *Bradley*, 249 F. Supp. 3d at 174. Accordingly, whatever vitality Ms. Bradley's arguments might have against defendants still subject to a medical malpractice claim, there is none against the NCAA. On that basis alone, Plaintiff's motion should be denied.[16]

II. THE NCAA'S AFFIRMATIVE DEFENSES ARE SUPPORTED BY THE RECORD IN THIS CASE

A. *Plaintiff's Arguments Are Improperly Grounded in an Artificial Division of Her Claim*

In advancing her medical malpractice claim, Plaintiff endeavors to limit the scope of the issue to her preferred time frame. Specifically, she sets the point of demarcation at the moment she reported concerns to AU staff, claiming only events that follow are relevant to her claim. Her motion is littered with arguments along these lines: "this [] case is not about the fact that she suffered a concussion but . . . rather negligent care and treatment," Opp. 21; arguments that Plaintiff "assumed the risk of suffering a concussion while playing [are] irrelevant," *id.*; defendants improperly attempt to "commingle" Plaintiff's assumption of risk in playing field hockey with assumption of risk for malpractice, *id.* at 23; and evidence of contributory negligence that "pre-dates the alleged medical malpractice" is irrelevant, *id.* at 31. Plaintiff endeavors to justify this artificial exclusion of pre-medical malpractice conduct by advancing a single-action causation theory. She posits, "in order for such evidence to be relevant to the case at hand, there must be evidence that the concussion was the *sole* cause of the damages for which Plaintiff now complains." *Id.* at 26; *id.* at 27 ("The only way for the defense of assumption for the risk to be relevant … is if the defense is prepared to offer testimony that all of her damages … [were] *solely* the result of the initial blow suffered on September 23, 2011.") (emphasis in original).

[16] As explained above, Plaintiff's attempt to rebrand her medical malpractice claim against the NCAA as a general negligence claim does not supply a basis for defeating the NCAA's motion for summary judgment. *Supra* at pp. 13-16.

The doctrinal basis for Plaintiff's contention is, however, unknown because she cites no case law to support it. Yet, under settled law, nothing precludes the NCAA from arguing that Ms. Bradley's injuries were proximately caused by Plaintiff's alleged concussion (rather than subsequent medical treatment) and that Ms. Bradley either assumed the risk or was contributorily negligent with respect to that conduct—or, at a minimum, that the concussion was one of multiple causes, thereby warranting corresponding apportionment of damages. *See, e.g.*, *Harvey v. D.C.*, 798 F.3d 1042, 1058 (D.C. Cir. 2015) (finding abuse of discretion where court excluded defense evidence that institutional resident's decline in health was attributable, at least in part, to his pre-existing medical conditions rather than inadequate care); *Hill v. McDonald*, 442 A.2d 133, 137 (D.C. 1982) ("There may be several causes concurring to produce the harm.") (citing *Ballard v. Polly*, 387 F. Supp. 895, 900 (D.D.C. 1975)). Such arguments are particularly appropriate here given that Plaintiff's own expert testified that "all of [Ms. Bradley's] subsequent practices and games that she played after [September 23, 2011] probably contributed to the very prolonged post-concussion syndrome that she ultimately sustained." SAUMF ¶ 57.

If Plaintiff wants the NCAA's affirmative defenses to apply only to post-injury, diagnosis-related activities, that is fine, but the NCAA was not involved in Plaintiff's post-injury, diagnosis-related activities. Ms. Bradley should, therefore, dismiss her claim against the NCAA. However, if the claim is not dismissed, the NCAA is entitled to put on evidence demonstrating that the cause of any injury was the alleged concussion and, as to that, Plaintiff assumed the risk, was contributorily negligent in reporting her symptoms, and failed to mitigate damages.

B. *Ample Evidence Exists in Support of the NCAA's Affirmative Defenses*

Accounting for all conduct relevant to Ms. Bradley's claim, there is significant evidence supporting the NCAA's affirmative defenses. At a minimum, there is sufficient evidence for the defenses to be considered by a jury. Accordingly, Plaintiff's motion should be denied.

1. Plaintiff Assumed the Risk of Playing Field Hockey

Assumption of the risk has two elements: (1) actual knowledge and comprehension of the potential dangers; and (2) voluntary exposure to that danger. *See, e.g.*, *Novak v. Capital Mgmt. & Dev. Corp.*, 570 F.3d 305, 313-14 (D.C. Cir. 2009) (citing *Morrison v. MacNamara*, 407 A.2d 555, 566-68 (D.C. 1979)); *see also Maalouf v. Swiss Confederation*, 208 F. Supp. 2d 31, 42 (D.D.C. 2002) (because analyzing assumption of the risk is "heavily fact-based," the court should grant summary judgment *only* "if no real dispute exists as to the plaintiff's awareness of the relevant danger").

Ms. Bradley had actual knowledge of the potential dangers of playing field hockey, and voluntarily played field hockey for AU nonetheless. Further, Ms. Bradley acknowledged that, "[f]ield hockey is a . . . physical sport." SAUMF ¶ 34. During an AU pre-season compliance meeting, Plaintiff "signed concussion papers," which set forth the risks associated with concussions, and Ms. Bradley admits that she was informed that "if you're experiencing certain [concussion] symptoms to tell your trainer." SAUMF ¶ 35. On July 1, 2009, Plaintiff signed an "Acknowledgement of Risk" agreement with AU, where she acknowledged that she is aware of "the risks of injury inherent in athletic activities;" the risks in playing field hockey, in particular; and "that such risks may include death, paralysis and other serious permanent bodily injury." SAUMF ¶ 36.

Plaintiff also signed AU's "Concussion Statement," which reads: "I understand that participation in intercollegiate athletics includes the risk of injury, including but not limited to serious permanent injury and death. I further understand that there is a possibility that participation in my sport may result in a head injury or concussion. I have been provided with education on

head injuries and understand the importance of ***immediately*** reporting symptoms of a head injury/concussion to the Sports Medicine Staff."[17] SAUMF ¶ 38 (emphasis added).

Under District of Columbia law, a plaintiff's "voluntary decision to proceed in the face of [a] known risk 'relieves the defendant of any duty which he otherwise owed the plaintiff.'" *Krombein v. Gali Serv. Indus., Inc.*, 317 F. Supp. 2d 14, 20 (D.D.C. 2004) (citing *Sinai v. Polinger Co.*, 498 A.2d 520, 524 (D.C. 1985)). Based on the above and drawing all reasonable inferences in the NCAA's favor, the NCAA has clearly established sufficient facts to show that Plaintiff assumed the risk of playing field hockey.[18]

2. Plaintiff Was Contributorily Negligent in Her Actions

"To assert a defense of contributory negligence, the defendant 'must establish by a preponderance of the evidence, that the plaintiff failed to exercise reasonable care, and that this failure was a substantial factor in causing the alleged damage or injury.'" *Lans v. Adduci Mastriani & Schaumberg L.L.P.*, 786 F. Supp. 2d 240, 311 (D.D.C. 2011) (Walton, J.) (citation omitted). From the moment Plaintiff initially suffered her head injury through the day when Dr. Puneet Singh diagnosed her, Plaintiff took a number of actions that demonstrate her failure to exercise reasonable care. These failures were substantial factors in causing the alleged damage or injury.

Plaintiff sustained her alleged injury on September 23, 2011, and though she reported her symptoms to AU athletic trainers or staff (as Plaintiff notes), she waited until on or around October

[17] All of this was in addition to what Plaintiff previously knew as an athlete with a wealth of success and experience in field hockey and having suffered a concussion prior to her alleged September 2011 injury. Opp. 24; *see also* PSUMF, ¶ 2; SAUMF ¶¶ 36, 39. Plaintiff was not only aware of concussions, but also of their long-term effects.

[18] The NCAA disputes Plaintiff's argument that Ms. Wilfert renounced any defense of assumption of the risk. *See* Opp. 28-29. At the deposition, Ms. Wilfert was asked "if there's any contention that Ms. Bradley assumed any risk after she voiced her complaints to her team trainers and physicians," to which she responded, "[the NCAA has] not made any contention. We don't have any firsthand knowledge." Ex. C, Wilfert Depo. 86:13-21. As Ms. Wilfert stated (which was accompanied by an objection from counsel, which the NCAA maintains, *Id*. at 85:16-86:7), neither she nor the NCAA can opine on, nor take a position on, events they have no personal knowledge regarding and over which they have no control.

1 or 2, 2011, to do so—over a week after her alleged head injury (a fact that Plaintiff ignores, Opp. 31). *See* PSUMF ¶¶ 3-5. In the interim, Plaintiff played in multiple games and practices. SAUMF ¶¶ 40-41. This was inconsistent with the educational information and direction she received as part of AU's "Concussion Statement," which emphasized the "importance of *immediately* reporting symptoms of a head injury/concussion to the [AU] Sports Medicine Staff." SAUMF ¶ 38 (emphasis added).

Plaintiff's own expert testified that her continued involvement in field hockey after the initial injury exacerbated her injuries.[19] Indeed, Dr. Cantu explained, an athlete "should be held out from the time that [a] concussion is recognized," and "the *sooner* it's recognized, the better." SAUMF ¶ 54 (emphasis added). Here, he explained, "all of [Ms. Bradley's] subsequent practices and games that she played after [September 23, 2011] probably contributed to the very prolonged post-concussion syndrome that she ultimately sustained." SAUMF ¶ 57; *see also id.* at ¶ 60 ("continuing to play [field hockey] while symptomatic [] I believe is responsible for her prolonged post-concussion syndrome"). Accordingly, there is ample evidence that Ms. Bradley's delay in reporting her alleged injury immediately after reporting her injury contributed to the impact of her alleged concussion.

3. Plaintiff Failed to Mitigate Her Damages[20]

"Mitigation requires a party to take reasonable steps after it has been injured to prevent further damage from occurring." *Adenariwo v. Fed. Mar. Comm'n*, 808 F.3d 74, 80 (D.C. Cir. 2015). As noted above, *supra* at pp. 30-31, Plaintiff did not take reasonable steps to mitigate her damages after her alleged injury on September 23, 2011, by electing to ignore the educational

[19] Notably, Plaintiff recognizes the NCAA is not responsible for her initial in-game injury. Opp. 14 ("Plaintiff is not faulting Defendant NCAA with the fact that she received a concussion while playing field hockey.").
[20] Plaintiff offers no independent argument regarding the NCAA's other defenses (contact sports exception, statute of limitations, estoppel, and waiver). Opp. 19-21. Nonetheless, after considerable deliberation, the NCAA formally withdraws its timeliness and contact sports exception affirmative defenses.

information and direction provided by AU and deciding, instead, to: (1) wait to report her symptoms to any AU athletic trainers or staff until over a week after her alleged head injury; (2) play in a field hockey game only a day after reporting her alleged injury, despite being symptomatic; and (3) continue to participate in multiple field hockey games after she was diagnosed with a brain virus and vertigo by Dr. Morris. *Supra* at *id.* According to Dr. Cantu, Ms. Bradley's decision to attend practices and play in games after her alleged injury, and prior to reporting her injury to the AU staff, likely contributed to the "very prolonged post-concussion syndrome that she ultimately sustained." SAUMF ¶ 57. As such, the evidence demonstrates Plaintiff had multiple opportunities to limit and positively impact the outcome of her injury but decided not to. Thus, at a minimum, a factual dispute exists as to whether Ms. Bradley chose not to mitigate damages.

CONCLUSION

The Court need not address Plaintiff's Motion for Summary Judgment Pertaining to Defendant NCAA's Affirmative Defenses if the NCAA is itself entitled to summary judgment. It is. As explained, the NCAA has no legally recognizable duty to Plaintiff, it did not breach any duty even if one were owed, and the cause of Plaintiff's injuries, even under Plaintiff's own theory, were the alleged concussion itself and the failure to diagnose, neither of which are attributable to the NCAA.

However, if this Court were to deny the NCAA's motion for summary judgment and address Plaintiff's motion, Plaintiff's motion should be denied because Plaintiff has failed to demonstrate there are no factual disputes concerning the NCAA's affirmative defenses of assumption of the risk, contributory negligence, and failure to mitigate damages.

December 2, 2019

Respectfully submitted,

/s/ William F. Stute

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2019, I filed the Reply Memorandum in Support of Defendant National Collegiate Athletic Association's Motion for Summary Judgment Regarding Negligence as well as the Defendant NCAA's Opposition to Plaintiff's Motion for Summary Judgment Pertaining to Defendant NCAA's Affirmative Defenses and accompanying documents using the CM/ECF system, which caused a copy to be served by email on all counsel of record.

Respectfully submitted,

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